Supreme Court, U.S.
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NO. 92-1742

IN THE

Supreme Court of the United States

October Term, 1992

AMERICAN HOME ASSURANCE COMPANY,

Petitioner,

v.

REPUBLIC INSURANCE COMPANY AND UNITED NATIONAL INSURANCE COMPANY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PREFACE

Respondents' counsel seeks to becloud the legal issues involved in the underlying action by use of descriptive language characterizing petitioner's positions rather than address their merits. The repeated disparaging characterizations of petitioner's arguments does not diminish their validity nor detract from the sound legal principles involved.

REPLY ARGUMENT

The main foundations of the petition for a writ of certiorari were and still are the following:

1) The district court's findings of fact relied upon for choice of law and jurisdiction were intertwined and mutually exclusive.

2) The lower courts usurped the role of the New York State courts by creating substantive law in the absence of any state precedent.

3) The district court and the circuit court are compelled to apply the entire statutory and/or common law of the state applicable under choice of law principles.

Respondents' brief in opposition refers this Court to records and briefs submitted to the courts below. In addition, respondents make reference to various reported cases. The citations from said cases are inaccurate. By failing to provide the Court on this motion with copies of the above-referenced documents it is totally impossible to verify their accuracy and/or authenticity.

The briefs presently before this court contain only the decisions of the Second Circuit Court of Appeals and the District Court. The respondents cite portions of those decisions in support of their position. The citations are not only taken out of context but are completely unsupported by reference to said decisions. The same statement is applicable to all of the relevant references made in the entire respondents' brief.

Should this court come to the conclusion that the references to the decisions of the district court and the circuit court are erroneous and without foundation, it is respectfully submitted that this court give the same degree of credibility and/or reliability to all of the respondents' references until such time as the entire record as well as the cases cited are made available for review.

Respondents state to this court at page 16, footnote 19 of their opposition brief that the circuit court decision held:

> "American Home misleads this Court by arguing that it was deprived of the ability to conduct proper discovery. (Petitioner's Brief 8, 53.) As the Second Circuit properly observed, this suit was commenced in early 1990. In the substantial time between the commencement of the suit and Republic and United National's motion for summary judgment filed in June 1991, American Home had all the time necessary to conduct discovery. (A.9-10.)"

Nowhere in the circuit court decision does it state that

> "In the substantial time between the commencement of the suit and Republic and United National's motion for summary judgment filed in June 1991, American Home had all the time necessary to conduct discovery [emphasis added]."

No such language can be found nor any allegation or inference by the circuit court that the petitioner was dilatory and had the sufficient time to conduct discovery.

The irrefutable facts (known to respondents and completely supported by the record below) are that at the first legal opportunity in 1990 a plethora of discovery demands and notices for depositions were served upon counsel for the respondents including specific demands for their entire claims files.

Counsel for respondents did not comply with the demands necessitating the need for judicial intervention to compel same. Pursuant to the district court rules, requests were made for leave to make the appropriate motions to compel the discovery. In opposition to said request the lower court was advised by counsel for the respondents that they intended to move

for summary judgment. Based upon that representation, the lower court denied the application and in addition stayed all discovery including the depositions of non-party witnesses such as the insured, Mobile Gas Service Corp., with leave to renew pending the outcome of the motion for summary judgment.

The district court precluded the petitioner from conducting any discovery. Proof positive of same is that petitioner has never received copies of the claims files nor conducted depositions of any parties including non-party witnesses such as the insured, primary carrier's claims department, primary carrier, etc.

It is axiomatic that an excess carrier rarely if ever has direct contact with the insured. In the instant matter, the excess carrier is a "following form" carrier. Issues of liability, investigation, evaluation and proper notice (per insurance contract) all come within the purview of the primary carrier's responsibility. An insured would never place an excess carrier on notice of its notification to a second layer co-excess carrier of possible exposure. The only way to ascertain whether or not notice provisions applicable to a second layer co-excess

carrier were complied with is through discovery proceedings. The respondents' counsel as well as the district court were aware that petitioner was not the primary carrier and in its position as excess carrier had no knowledge of what acts of omission or commission were made by the insured or primary carrier's counsel on the issue of notice to second layer excess carriers. Depositions were the only avenue available to petitioner to ascertain the information. Knowing full well of the legal obstacles to conducting discovery initiated by respondents, it is inconceivable how respondents can in good conscience state to this Court that petitioner had time to conduct discovery.

If petitioner was denied the right to commence a lawsuit it would be a deprivation of petitioner's rights without due process of law. Allowing petitioner the right to commence a lawsuit, but denying petitioner the right to conduct discovery proceedings to ascertain the credibility, veracity and legal sufficiency of the respondents' denials and affirmative defenses is similarly a denial of due process.

Respondents continue their tactics in footnote 20 at page 16 in their brief as evidenced by the following:

> "American Home's reference to the *Marino v. New York Telephone Company,* 944 F.2d 109, 114 (2d Cir. 1991) decision is unavailing because as the Circuit Court noted, the circumstances necessary to satisfy the *Marino* exception do not exist here. (A.11.) *See e.g., Ogden Corp.,* 739 F.Supp at 803-804."

A reading of the circuit court's decision makes it crystal clear that said court never mentions *Marino v. New York Telephone Company* nor does it by implication state that the "circumstances necessary to satisfy the *Marino* exception do not exist here".

It is inconceivable that this was a mere inadvertence on the part of respondents. The circuit court makes no mention of Chief Justice Meskill's opinion in *Marino* as it would not support their conclusions (A.11). Had the circuit court addressed Chief Justice Meskill's opinion in *Marino* it would have either required the

application of Insurance Law 3420(d) or the certification of the question to the New York Court of Appeals.

THE DISTRICT COURT'S FINDINGS OF FACT RELIED UPON FOR CHOICE OF LAW AND JURISDICTION WERE INTERTWINED AND MUTUALLY EXCLUSIVE

Petitioner never made any allegation as to where the respondents' principal place of business was. Petitioner was unaware of same and could only become aware if allowed to conduct depositions.

It was the district court that made the finding as to respondents' principal place of business. The district court made this finding of fact as a basis for the application of New York law to the instant matter. This finding of fact utilized to resolve the choice of law question automatically divested the federal court of jurisdiction by virtue of 28 U.S.C. § 1332.

Petitioner commenced the underlying action in the Supreme Court of the State of New York and in its pleadings alleged that the respondents were foreign corporations. This is not synonymous with an allegation

as to where a corporation's principal place of business is located.

Diversity of citizenship was not an issue in the state court proceedings. Respondents' diversity of citizenship became germane when respondents alleged same in their motion to remand to the federal court.

If the district court was correct in its findings "that the parties' principal place of business is here [New York]" then there is no federal jurisdiction. If the aforementioned finding of fact was erroneous, then there is no question that the federal court has jurisdiction and therefore, there is also no question that "choice of law" negates the application of New York law. Respondents conceded as much by stating to the lower court that "the only, albeit tenuous, connection to New York in this regard, is that New York was the place of delivery to the extent Stone and Webster received the policy...". In addition, the significant elements for applying New York law as set forth in *Olin Corporation v. Insurance Company of North America*, 929 F.2d 62, *aff'd* 743 F.Supp. 1044, 1048 (2d Cir. 1991) are absent.

THE LOWER COURTS USURPED THE ROLE OF THE NEW YORK STATE COURTS BY CREATING SUBSTANTIVE LAW IN THE ABSENCE OF ANY STATE PRECEDENT

There are a plethora of decisions in the State of New York referable to insureds and/or insurance companies. In addition there are statutes in the State of New York referring to insureds and insurance companies.

Common and statutory law have created and recognized various legal descriptive terminologies which create certain rights, duties and obligations. Amongst all of the common and statutory law until the instant matter there has never been a descriptive legal term "direct insurers" utilized by the courts of the State of New York.

Statutes and decisions of the New York courts refer to insurance companies as primary, excess and reinsurers. The statutes and decisions have created various duties and obligations vis-a-vis insurer and the insured by virtue of the designation primary and/or excess.

The district court as the main pillar and/or support for its granting of summary judgment created a new descriptive legal term for certain insurance carriers designating same as "direct insurers". The court's definition of "direct insurers" encompassed the previously designated category of primary and excess and by judicial fiat made primary and excess insurers one and the same. To follow this reasoning to its logical conclusion, all prior law referring to primary insurer is now applicable to an excess insurer as they are now both deemed "direct insurers". This concept would wreak havoc with the existing law of the State of New York which drew definite distinctions between primary and excess carriers.

The new category of "direct insurers" with its legal implications was created by the district court, adopted by respondents and endorsed by the Second Circuit Court of Appeals. The foundation of the Second Circuit Court of Appeals affirmance is its speculation that Judge Hancock when writing for the unanimous court in *Unigard Security Insurance Company v. North River Insurance Company,* 79 NY2d 576, 584 N.Y.S.2d 290, 588 NE2d 91, 949 F.2d 630 (2d Cir. 1992), utilized the ordinarily used and accepted term "primary insurer" he in

fact meant "direct insurer", a legal descriptive terminology heretofore absent from prior New York decisions.

Though petitioner recognizes that words can take on different meanings in different contexts, the legal community has a right to rely upon the concept that a word is being used how it ordinarily is used. That right must not be abrogated by the speculation of one court as to a non-ordinary use of a legal term by another court absent some clear intent for the word to have a different use.

Ignoring for the moment how the circuit court could possibly know the "context" Judge Hancock meant (*Unigard*), petitioner submits the following statement made by learned Justice Antonin Scalia in his dissent in *Smith v. United States,* No. 91-8674:

> "The Court does not appear to grasp the distinction between how a word can be used and how it ordinarily is used."

Nowhere in the *Unigard* decision does the New York Court of Appeals use the terminology "direct insurer". The word "primary insurer" is used in the

manner that it ordinarily is used consistent with prior decisional and statutory law.

If this Court, upon reviewing the *Unigard* decision can come to the conclusion without reservation that Justice Hancock was stating that the limited exception to the New York "no prejudice rule" was applicable to all insurance companies that write directly with the insured, then the request for certification was properly denied. If there is any reasonable doubt as to whether or not the Court of Appeals of the State of New York wished to establish a "no prejudice rule" applicable to all insurance companies that write directly with insureds then the existing federal law mandates that the question be certified to the Court of Appeals of the State of New York.

A further element to be considered is the fact that the identical issue is presently pending in the courts of the State of New York which will ultimately be resolved by an appellate court. In the event the New York State courts interpret "primary insurers" contrary to the circuit court a grave injustice would result to petitioner. We once again urge that the judiciary of the

State of New York be allowed to determine the applicability of the "no prejudice rule" to an excess carrier.

THE DISTRICT COURT AND THE CIRCUIT COURT ARE COMPELLED TO APPLY THE ENTIRE STATUTORY AND/OR COMMON LAW OF THE STATE APPLICABLE UNDER CHOICE OF LAW PRINCIPLES

The third point which American Home proffers in support of its petition relates to the application of the complete body of New York law once the lower courts held the law of the State of New York applied to this litigation. In support of this argument, the petitioner cited the decision of *Marino*, supra, wherein Chief Justice Meskill stated:

> "While some courts have applied section 3420(d) to accidents occurring outside New York when the policy was issued in New York and there existed very strong connections to New York, that particular issue has not been addressed by the New York Court of Appeals. Section 3420(d) is clearly limited in application to policies delivered or issued for delivery in New York." *Marino*, supra at p. 14.

Hence, American Home properly requested that the Circuit Court of Appeals find that Insurance Law 3420(d) applied since the district court had previously found that New York law applies because:

> "...the controlling contracts were made here and because the parties' principal place of business is here."

In the alternative, American Home requested that the second circuit allow the New York Court of Appeals to decide upon the applicability of Insurance Law 3420(d) to accidents occurring outside New York where the policy was issued or delivered within the state, utilizing the certification process as the vehicle. The second circuit ignored this request as well as Chief Justice Meskill's opinion in *Marino*. The circuit court chose to treat the decision in *Marino* as non-existent despite the fact that it was decided subsequent to *Ogden Corp. v. Travelers Indemnity Company,* 739 F.Supp. 796 (S.D.N.Y. 1989), *aff'd*, 924 F.2d 390 (2d Cir. 1991).

The reliance upon *Ogden* even if *Marino* had not been decided is misplaced as the *Ogden* decision

was based upon the New York statute's inapplicability to matters involving property damage. The facts in the *Ogden* case concerned a property damage claim. Insurance Law 3420(d) refers specifically to death or bodily injury.

We make no comment as to the statements made in footnotes 3, 4, 5, 7, 11, 14, 15, 16, 17 and 18, and if this Court grants this petition for a writ of certiorari the inaccuracies and misstatements contained therein will become crystal clear because the entire record of all the proceedings below will be made available to this Court.

Dated: New York, New York
June 8, 1993

Respectfully submitted,

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